

**THE STATE**

**Versus**

**LESSON MOYO**

IN THE HIGH COURT OF ZIMBABWE  
MAKONESE J  
BULAWAYO 28 OCTOBER & 4 NOVEMBER 2021

**Criminal Review**

**MAKONESE J:** This matter has been referred to me by the scrutinizing Regional Magistrate for review.

The accused was convicted and sentenced on a charge of contravening section 49 (a) of the Criminal Law (Codification & Reform) Act (Chapter 9:23). The accused pleaded guilty to the charge.

The brief facts surrounding the commission of the offence are these. On 31<sup>st</sup> July 2021, the accused, the holder of a valid drivers' licence in respect of classes 2, 4 and 5 was driving a Toyota Hilux registration number ADS 2834, towing a trailer loaded with various goods, along Solusi Road. The vehicle had a right rear tyre burst leading the driver to lose control of the vehicle. The vehicle veered off the road and overturned. One passenger sustained serious head injuries and died at Mpilo Hospital that same day.

The facts clearly show that the motor vehicle that was being driven is a public service vehicle and as such it is mandatory for the court to prohibit the driver if found guilty, unless the court finds special circumstances. This fact must be endorsed on the record of proceedings.

Section 52 (a) (c) for the Road Traffic Act (Chapter 15:11) provides that a person found guilty in terms of this Act shall be liable:

“... ”

- (c) in the case of an offence involving the driving of a commuter omnibus or a heavy vehicle, shall prohibit the person from driving for a period of not less than two years.

Provided that the court may decline to prohibit the person from driving in terms of para (b) or (c) if it;

- (a) considers that there are special circumstances in the case which justify the court in so declining and;
- (b) endorse the special circumstances referred to in paragraph (a) on the record of the case when passing sentence.”

In this matter, the learned magistrate in the court *a quo* ruled that there were special circumstances. The magistrate’s reasoning is captioned in a letter dated 7<sup>th</sup> October 2021 addressed to the Regional Magistrate in the following terms:

*“I acknowledge receipt of the white paper. The trial magistrate placed reliance on paragraph 3 of the state outline which stated that ... the vehicle had a rear tyre burst ...”* The trial magistrate had opined that the Investigating Officer had included that in the state outline after interviewing the surviving passengers as he would normally be required to do. Further the VED examination report in part (h) indicated that the examiner observed that the rear right tyre ceased and burst. From the report, it appears that it is the only tyre that burst from the accident. The trial magistrate does acknowledge that the traffic evaluator’s report does not blame the accused for the accident. It had appeared to the trial magistrate that the rear tyre burst might also have contributed to the vehicle accident and the trial magistrate wrongly concluded that it is a special circumstance surrounding the commission of the accident.”

*Having said that the trial magistrate acknowledges his error and endeavours not to repeat a similar mistake. The trial magistrate still stands guided.”*

It is clear that the trial magistrate made a factual conclusion that the tyre burst was a mechanical fault without any legal basis or foundation. The averments in the state outline do not constitute evidence. No evidence was placed before the court to indicate that the tyre burst was a result of a mechanical failure. The court had “an opinion” that the tyre burst amounted to a special circumstance. In his report the Vehicle Inspector one L. Jeche did not make a finding that the tyre burst amounted to a mechanical fault which caused the accident. His findings were that the roll-over of the vehicle caused damages to the head lamp, grill, bonnet, tail lights, windscreen, steering wheel, right front shock and tyres.

The Traffic Evaluator, one Brian Mubereki concluded as follows:

*“Considering the indications by the driver involved and also my observations at the scene I will blame the driver for causing the accident.”*

In this matter we have two experts who in their reports never mentioned that the tyre burst was caused a mechanical fault. The court *a quo* chose to believe the version of the accused and concluded that the tyre burst was a mechanical fault amounting to special circumstances. This was a misdirection as there was no legal and scientific basis for concluding that there was a mechanical fault. The case of *Assurance Fund v Kenny* 1984 (4) SA 432 (E) is authority for the proposition that expert evidence should be preferred where the direct evidence of eyewitness is not credible. See also *Bundire v Buttress* HH-46-09.

There is no doubt that the trial magistrate had no reason to accept the word of the accused against the expert findings of the Vehicle Inspector and the Accident Evaluator. There are no special circumstances in this matter.

In the result, it is ordered as follows:

1. The conviction be and is hereby confirmed.
2. The matter is remitted to the trial magistrate for the accused to be recalled and sentenced according to law in terms of s52 (a) (c) of the Road Traffic Act.

Makonese J.....

Kabasa J agrees.....